

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

THOMAS LELAND FLOYD,

**Plaintiff,**

V.

CITY OF LAKEWOOD, CITY OF  
TACOMA, COUNTY OF PIERCE, STATE  
OF WASHINGTON, CHIEF KARR, KENT  
HARMELL, STEVEN GANT, MICHAEL  
KAWAMURA, OFFICER PAPP, THEO  
ROSE, BAILIFFS SUPERIOR COURT  
ROOM 260, JANZ PIERSON, AARON  
TALNEY, RICHARD WHITEHEAD, M.  
SCOLD, CARLOS ORTIZ, OFFICER  
DARCY, TACOMA POLICE  
DEPARTMENT, LAKEWOOD POLICE  
DEPARTMENT, JUDGE FRANK  
FLEMING, JUDGE LEE, JUDGE  
CULPEPPER, SARGEANT JONES,  
DIRECTOR OF POLICE DEPARTMENT,  
JUDGE HILLIER, JUDGE SANDER  
ALLEN, JUDGE KITTY VAN DOORN,  
TIM BARTLETT, and ELLEN CHAMBERS

### Defendants.

No. C11-5068 BHS/KLS

## ORDER TO AMEND OR SHOW CAUSE

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Under separate Order, Plaintiff has been granted leave to proceed *in forma pauperis*. Before the court for review is Plaintiff's civil rights complaint. ECF No. 8. After careful review, the court declines to serve the complaint because it is deficient.

**ORDER TO AMEND OR SHOW CAUSE- 1**

## DISCUSSION

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations omitted). In other words, failure to present enough facts to state a claim for relief that is plausible on the face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

Although complaints are to be liberally construed in a plaintiff’s favor, conclusory allegations of the law, unsupported conclusions, and unwarranted inferences need not be accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Neither can the court supply essential facts that an inmate has failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). Unless it is absolutely clear that

ORDER TO AMEND OR SHOW CAUSE- 2

1 amendment would be futile, however, a pro se litigant must be given the opportunity to amend  
 2 his complaint to correct any deficiencies. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

3 Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, “the complaint [must  
 4 provide] ‘the defendant fair notice of what the plaintiff’s claim is and the ground upon which it  
 5 rests.’” *Kimes v. Stone* 84 F.3d 1121, 1129 (9th Cir. 1996) (citations omitted). In addition, in  
 6 order to obtain relief against a defendant under 42 U.S.C. § 1983, a plaintiff must prove that the  
 7 particular defendant has caused or personally participated in causing the deprivation of a  
 8 particular protected constitutional right. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).  
 9 To be liable for “causing” the deprivation of a constitutional right, the particular defendant must  
 10 commit an affirmative act, or omit to perform an act, that he or she is legally required to do, and  
 11 which causes the plaintiff’s deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

12 Plaintiff’s complaint lists as defendants, twenty-nine individuals, judges, public  
 13 defenders, and state, county, and city entities. His complaint is largely illegible. As far as the  
 14 court is able to discern, the Plaintiff is attempting to sue these various individuals and entities for  
 15 violating his Eighth Amendment rights when he was injured during a false arrest on January 26,  
 16 2010. Along with other damages and relief, Plaintiff seeks “2 trillion” in damages for “false  
 17 imprisonment and threats.” The court cannot fully evaluate the adequacy of Mr. Floyd’s  
 18 complaint because it is unable to read it. For that reason alone, the court will not serve the  
 19 complaint, but will provide Plaintiff an opportunity to file an amended complaint setting out in  
 20 legible form, his claims. Plaintiff is further advised as follows:

21 To state a claim under 42 U.S.C. § 1983, a complaint must allege that the conduct com-  
 22 plained of was committed by a person acting under color of state law and that the conduct  
 23 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the

24 ORDER TO AMEND OR SHOW CAUSE- 3

1 United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*, *Daniels*  
 2 *v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged  
 3 wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th  
 4 Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

5 There must be an actual connection or link between the actions of the defendants and the  
 6 deprivation alleged to have been suffered by plaintiff. *See Monell v. Department of Social*  
 7 *Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Rizzo v. Goode*, 423 U.S. 362, 96  
 8 S.Ct. 598, 46 L.Ed.2d 561 (1976). “A person ‘subjects’ another to the deprivation of a  
 9 constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in  
 10 another’s affirmative acts or omits to perform an act which he is legally required to do that  
 11 causes the deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th  
 12 Cir.1978).

14 On the basis of these standards, Plaintiff has failed to state a claim upon which relief can  
 15 be granted. Plaintiff purports to sue the State of Washington, Pierce County, two cities within  
 16 Pierce County and their police departments. However, under 42 U.S.C. § 1983, claims can only  
 17 be brought against people who personally participated in causing the alleged deprivation of a  
 18 right. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9<sup>th</sup> Cir. 1981). Neither a State nor its officials acting  
 19 in their official capacities are “persons” under section 1983. *Will v. Michigan Dept. of State*  
 20 *Police*, 491 U.S. 58, 71 (1989). Plaintiff must set forth factual allegations and allege with  
 21 specificity the names of the persons who caused or personally participated in causing the alleged  
 22 deprivation of his constitutional rights. A defendant cannot be held liable under 42 U.S.C. §  
 23 1983 solely on the basis of supervisory responsibility or position. *Monell v. New York City Dept.*  
 24 *of Social Services*, 436 U.S. 658, 694 n.58 (1978). A theory of *respondeat superior* is not

25  
 26 ORDER TO AMEND OR SHOW CAUSE- 4

1 sufficient to state a § 1983 claim. *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982). In addition,  
2 and despite his IFP status, Plaintiff must provide the court with information necessary to identify  
3 the defendants to be served. *See, Walker v. Sumner*, 14 F.3d 1415, 1415 (9th Cir. 1994).

4 Plaintiff further purports to sue six judges. However, judges are absolutely immune from  
5 liability for damages in civil rights suits for judicial acts performed within their subject matter  
6 jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *Ashelman v. Pope*, 793 F.2d 1072,  
7 1075 (9th Cir. 1986) (en banc); *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988) (per  
8 curiam). Acts are judicial where the acts are normally performed by a judge, and where the  
9 parties deal with the judge in his or her judicial capacity. *Sparkman*, 435 U.S. at 362; *Crooks v.*  
10 *Maynard*, 913 F.2d 699, 700 (9th Cir. 1990). A judge will not be deprived of immunity because  
11 the action he took was in error, was done maliciously, or was in excess of his authority; rather,  
12 he will be subject to liability only when he has acted in the clear absence of all jurisdiction,”  
13 *Sparkman*, 435 U.S. at 356-57 (citation omitted), that is, when he or she acts in a private or  
14 nonjudicial capacity, see *Henzel v. Gerstein*, 608 F.2d 658 (5th Cir. 1979).

15 Plaintiff also lists two public defenders as defendants. However, it is well established  
16 that court appointed attorneys are not state actors. *Polk County v. Dodson*, 454 U.S. 312, 325,  
17 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (public defender who is performing a lawyer’s traditional  
18 functions as counsel to a defendant in a criminal proceeding is not acting under color of state  
19 law); *Miranda v. Clark County of Nevada*, 319 F.3d 465, 468 (9th Cir.2003) (upholding  
20 dismissal of a complaint on the basis that public defender was not acting on behalf of the county  
21 for purposes of § 1983 when defendant’s function in his role as plaintiff’s attorney was to  
22 represent plaintiff’s interests, not the interests of the state). As such, public defender did not act  
23 under color of state law and Plaintiff’s complaint fails state a claim under section 1983.  
24  
25

26 ORDER TO AMEND OR SHOW CAUSE- 5

Finally, in order to recover damages for an alleged unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

Although Plaintiff claims that he was forced to "plead guilty in 1972 to a crime" of which he was innocent (ECF No. 8, p. 4), he does not allege that the conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Due to the deficiencies described above, the court will not serve the complaint. Plaintiff may file an amended complaint curing, if possible, the above noted deficiencies, or show cause explaining why this matter should not be dismissed no later than **April 15, 2011**.

An amended complaint must set forth all of Plaintiff's factual claims, causes of action, and claims for relief. Plaintiff shall set forth his factual allegations in separately numbered paragraphs and shall allege with specificity the following:

- (1) the names of the persons who caused or personally participated in causing the alleged deprivation of his constitutional rights;
- (2) the dates on which the conduct of each Defendant allegedly took place; and
- (3) the specific conduct or action Plaintiff alleges is unconstitutional.

An amended complaint operates as a complete substitute for (rather than a mere supplement to) the present complaint. In other words, an amended complaint supersedes the original in its entirety, making the original as if it never existed. Therefore, reference to a prior

1 pleading or another document is unacceptable – once Plaintiff files an amended complaint, the  
2 original pleading or pleadings will no longer serve any function in this case. *See Loux v. Rhay*,  
3 375 F.2d 55, 57 (9th Cir. 1967) (as a general rule, an amended complaint supersedes the prior  
4 complaint). Therefore, in an amended complaint, as in an original complaint, each claim and the  
5 involvement of each defendant must be sufficiently alleged.

6 Plaintiff shall present his complaint on the form provided by the court. The amended  
7 complaint must be **legibly rewritten or retyped in its entirety**, it should be an original and not a  
8 copy, it may not incorporate any part of the original complaint by reference, and it must be  
9 clearly labeled the “Amended Complaint” and must contain the same cause number as this case.  
10 Plaintiff should complete all sections of the court’s form. Plaintiff may attach continuation  
11 pages as needed but may not attach a separate document that purports to be his amended  
12 complaint. In order to make a short and plain statement of claims against the defendants,  
13 plaintiff should include factual allegations that explain how each named defendant was involved  
14 in the denial of his rights. The court will screen the amended complaint to determine whether it  
15 contains factual allegations linking each defendant to the alleged violations of Plaintiff’s rights.  
16 The court will not authorize service of the amended complaint on any defendant who is not  
17 specifically linked to the violation of Plaintiff’s rights.

18 If Plaintiff decides to file an amended civil rights complaint in this action, he is cautioned  
19 that if the amended complaint is not timely filed or if he fails to adequately address the issues  
20 raised herein on or before **April 15, 2011**, the Court will recommend dismissal of this action as  
21 frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a “strike” under 28 U.S.C.  
22 § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who brings three  
23 or more civil actions or appeals which are dismissed on grounds they are legally frivolous,  
24

25  
26 ORDER TO AMEND OR SHOW CAUSE- 7

1 malicious, or fail to state a claim, will be precluded from bringing any other civil action or  
2 appeal in forma pauperis "unless the prisoner is under imminent danger of serious physical  
3 injury." 28 U.S.C. § 1915(g).

4           **The Clerk is directed to send Plaintiff the appropriate forms for filing a 42 U.S.C.**  
5 **1983 civil rights complaint and for service. The Clerk is further directed to send a copy of**  
6 **this Order and a copy of the General Order to Plaintiff.**

7  
8           DATED this 16th day of March, 2011.

9  
10             
11           Karen L. Strombom  
12           United States Magistrate Judge